

UNCATEGORIZED

## Examining the Legal Anomalies Created by Inconsistencies between the European Convention on Human Rights and the Dayton Constitution

VISHESH BHATIA — 9 August, 2018



On 15<sup>th</sup> February, 2016, Bosnia and Herzegovina (hereinafter Bosnia) applied for membership to the European Union. It has since seen little progress towards achieving this goal, which is heavily due to the incompatibilities of its Constitution with the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention). While Bosnia's application for EU membership has brought these incompatibilities to the fore, this issue dates back to the drafting of the State's Constitution during the 1995 Dayton Peace Accords. The Constitution contains a discriminatory compromise that violates the Convention yet has in good part been responsible for the State's very existence – an emphasis on exclusionary majority ethnic representations in political institutions. This piece shall aim to explain how the Constitution's incompatibilities with the Convention render the Constitution incompatible with itself.

### Background

In 1992, during the dissolution of Yugoslavia, the Bosnian War erupted in Bosnia and Herzegovina between the NATO supported Bosniac (i.e. Bosnian Muslim) – Croat Forces and the Yugoslav supported Serb forces. In 1995, peace talks held at Wright-Patterson Airforce Base in Dayton, Ohio, resulted in the General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter the Dayton Agreement) that brought the conflict to an end. Annex IV of the Agreement would form the Constitution of Bosnia (hereinafter the Dayton Constitution).

The Dayton Constitution represented the competing interests of the three parties to the conflict, i.e. the Bosniacs, the Croats, and the Serbs, tempered by the intervention of international mediators. The parties demanded the inclusion of a number of controversial provisions in the Dayton Constitution in order to end the conflict. The first was Article IV, which stated that the House of Peoples (one of the two chambers of the Parliamentary Assembly) would be composed exclusively of 5 Bosniacs, 5 Croats, and 5 Serbs and that both the Houses of Peoples and the House of Representatives would alternate the

positions of Chair and Deputy Chairs between 1 Bosniac, 1 Croat and 1 Serb. The second was Article V, as per which Bosnia's Presidency would be composed exclusively of 1 Bosniac, 1 Croat and 1 Serb. The international mediators reluctantly accepted these demands, as was noted by the European Court of Human Rights in the Case of Sejdic and Finci v. Bosnia and Herzegovina (hereinafter Sejdic and Finci, at paragraph 13) but cognizant of the fact that these were likely conflicting with human rights, inserted Article II § 2, which read as follows (Sejdic and Finci, at paragraph 14):

*"The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."*

In essence, therefore, this provision of the Dayton Constitution found that the Convention would take precedence over all other law in Bosnia and has resulted in the conundrum subsequently discussed in this piece.

### **Electoral Provisions and Legal Anomalies**

On December 22<sup>nd</sup>, 2009, the Court delivered its judgment in Sejdic and Finci. It initially noted that the exclusionary rule was geared towards the restoration of peace, which is broadly compatible with the Convention's objectives as reflected in its Preamble and that the preoccupation of the negotiators of the Dayton Constitution with ensuring equality between the parties to the Conflict, i.e. the Croats, the Bosniacs and the Serbs, to ensure peace would explain (but not necessarily justify) the absence of other communities' representatives at the negotiations (Sejdic and Finci, at paragraph 45). However, it nonetheless observed that the applicants' (who were individuals of Roma and Jewish origin) prohibition from being elected to the House of Peoples, being on the grounds of ethnicity, lacked an objective and reasonable justification and therefore violated Article 14 of the Convention read with Article 3 of Protocol No. 1, which together prohibit discrimination in election to the legislature (Sejdic and Finci, at paragraphs 39-50). For this same reason, it noted that the applicants' prohibition from standing for election to the Presidency violated Article 1 of Protocol No. 12 (Sejdic and Finci, at paragraph 56). Subsequently, on 15<sup>th</sup> July 2014, the Court in the almost identical Case of Zornic v. Bosnia and Herzegovina and on 13<sup>th</sup> March 2017, the Department for the Execution of Judgments of the European Court of Human Rights noted that the Bosnian government, despite its repeated attempts, had not yet been able to successfully amend the constitution to enforce the Sejdic and Finci ruling.

The Convention – which under the Dayton Constitution, is the supreme law of Bosnia – entered into force on 3<sup>rd</sup> September 1953, while Protocol No. 1 entered into force on 18<sup>th</sup> May 1954. The Dayton Constitution entered into force on 14<sup>th</sup> December 1995, complete with the abovementioned controversial provisions. Therefore, Bosnia's electoral law (which, as mentioned earlier, is significantly responsible for the State's continued existence) has contravened the Convention since the drafting of the Dayton Constitution. Thus, the ending of the Bosnian War, and the State's existence today can be attributed to a set of constitutional provisions that appear to be an *ab initio* nullity due to their inconsistency with the supreme law of Bosnia – the Convention. Furthermore, as the Constitution finds that the Convention is the supreme law of Bosnia, yet the Constitution itself breaches that law, the Constitution essentially contravenes itself.

This legal anomaly has become apparent in light of Bosnia's application for EU membership, which is one of the few main aims of the present relations between Bosnia's two constituent entities (i.e. the Federation of Bosnia and Herzegovina and the Serb

Republic). However, for the entities to make any headway in achieving this goal, one of the initial reasons for the achievement of peace in Bosnia – the system of exclusionary majority ethnic representation – will have to be removed. The achievement of this goal is thus ironically contingent on whether or not the Bosnian government is prepared to make another historic compromise and remove these discriminatory constitutional provisions that were once responsible for the State's very existence.

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